RE LIM TAI NIAN, EX P KEWANGAN UTAMA BHD

HIGH COURT SABAH & SARAWAK, KUCHING
IAN HC CHIN J
[BANKRUPTCY PROCEEDINGS NO: 29-1018-99-I]
5 JULY 2001

BANKRUPTCY: *Receiving and adjudication orders - Appeal against - Whether sanction of official assignee required - Bankruptcy Act 1967, ss. 38(1)(a), 92*

BANKRUPTCY: *Petition - Opposition to petition - Defective notice - Application for extension of time - Inordinate delay - Whether fatal - Bankruptcy Act 1967, ss. 3(1)(i), 38(1)(a), 92 - Bankruptcy Rules 1969, r. 117*

BANKRUPTCY: *Practice and procedure - Counterclaim as a defence to bankruptcy petition - Pre-requisites - Bankruptcy Act 1967, s. 3(1)*

Kewangan Utama Berhad ('judgment creditor') had obtained judgment for RM105,852.62 against Lim Tai Nian ('judgment debtor') and subsequently issued a bankruptcy notice against him. Upon the judgment debtor's failure to comply with the said notice, the judgment creditor proceeded to take out this instant bankruptcy petition against him. The judgment debtor filed a Notice of Intention to Oppose Petition with a supporting affidavit. The judgment creditor raised a preliminary objection that r. 117 of the Bankruptcy Rules 1969 had not been complied with. The deputy registrar upheld the preliminary objection, dismissed the said notice and adjudged the judgment debtor a bankrupt. Thus the instant appeal without the sanction of the official assignee.

Held:

[1] *Albeit* that s. 38(1)(a) of the Bankruptcy Act 1967 ('the Act') required prior sanction of the official assignee before a judgment debtor could appeal against the bankruptcy order, it did not preclude the judgment debtor from seeking the court's discretion to review, rescind or vary any order made by it as that fell within the purview of s. 92 of the Act where no prior sanction of the official assignee was required. (p 45 h)

[2] The right to appeal was not a chose in action that could be vested with the official assignee. In any event, it would be perverse to expect the official assignee to sanction an appeal against the very order that he had supported – to construe so would necessarily mean that a bankrupt would never be able to appeal against an order made against him which would lead to absurdity of the law and injustice. (p 46 a-c)

[3] In spite of being brought to notice that the documents filed in purported opposition to the bankruptcy petition were defective, the judgment debtor's counsel chose to proceed without rectifying the same and only made a concerted attempt to file an application for extension of time well after he realised that the notice of opposition was unsustainable. The judgment debtor's counsel had not proffered any plausible reason or explanation for the inordinate delay. Under the circumstances, the senior assistant registrar had not erred in rejecting the request for an adjournment to file the application for extension of time. (p 47 c-f)

[4] Other matters regarded as constituting a counterclaim, set-off or cross-demand had been put forth unsuccessfully in the lower court. The judgment debtor was given leave to defend conditional upon him paying into court the sum claimed which he failed to do so as a result of which judgment was entered. The judgment debtor's allegation of fraud was at best construed as support for a counterclaim but not a set-off or cross-demand. The judgment debtor had not only unsuccessfully set up the counterclaim in the lower court but also failed to quantify the same. Thus the statutory requirements under s. 3(1)(i) of the Act for a counterclaim to be utlised as a defence were not met. (pp 47 g-i & 48 a-b)

[Appeal dismissed with costs to the judgment creditor.]

Case(s) referred to:

Bathamani Suppiah v. Southern Finance Co Bhd [2000] 2 CLJ 650 ***(foll)***
Datuk Lim Kheng Kim v. Malayan Banking Bhd [1993] 3 CLJ 324 ***(refd)***
In re Baron [1943] 1 Ch 177 ***(refd)***
Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan [1993] 3 CLJ 349 ***(refd)***
Re Khoo Kim Hock [1974] 2 MLJ 29 ***(foll)***
Re Low Kok Tuan [1997] 4 CLJ 185 ***(not foll)***

Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 38(1), 92(1), 105(1)
Bankruptcy Rules 1969, r. 117

Bankruptcy Act 1914, s. 108(2)

For the creditor - Supertinie Bojeng; M/s Mutang, Bojeng & Chai
For the debtor - Dominique Ng; M/s Dominique Ng & Assoc

Reported by K Ganesh

JUDGMENT

Ian HC Chin J:

Introduction

On 4 August 2000 Kewangan Utama Berhad, the creditor, took the present bankruptcy petition against the debtor Lim Tai Nian. The act of bankruptcy alleged to be committed by the debtor is that he failed to comply with the requisition of a bankruptcy notice that was served on him on 14 February 2000. He failed to pay the judgment sum of RM105,852.62 demanded by the notice. The judgment was obtained against him on 9 April 1999. The debtor filed a Notice of Intention to Oppose Petition and an affidavit in support.

The debtor's counsel was on 20 November 2000 informed that r. 117 of the Bankruptcy Rules 1969 has not been complied with and that objection would be taken at the hearing of the petition on 11 December 2000. The hearing was adjourned to 15 January 2001 whence, after hearing argument, it was adjourned to 12 March 2001 for the delivery of the ruling with regard to the preliminary objection. Before the last mentioned date, the debtor on 27 February 2001 filed an application to be allowed to take out the missing summons in chambers and requested that the same be heard on the same date where judgment was scheduled to be delivered. The deputy registrar on 12 March 2001 upheld the preliminary objection and dismissed the notice and therefore adjudged the debtor a bankrupt. Hence this appeal which was taken out without the sanction of the official assignee.

Whether The Debtor Can Appeal Without The Sanction Of The Official Assignee

Does s. 38(1)(a) of the Bankruptcy Act apply as to require prior sanction of the official assignee before the debtor can appeal against the order making him a bankrupt? That section is in these terms:

> (1) Where a bankrupt has not obtained his discharge – (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee;

That section has been construed by the court in *Re Khoo Kim Hock* [1974] 2 MLJ 29, *Re Low Kok Tuan* [1997] 4 CLJ 185 and *Bathamani a/p Suppiah v. Southern Finance Co. Bhd* [2000] 2 CLJ 650.

Re Khoo Kim Hock concerns an application to have the adjudication order annulled under ss. 92(1) and 105(1) and the court there held:

(1) section 38(1)(a) does not apply to an application under section 92(1) and 105(1) of the Bankruptcy Act, where a bankrupt is seeking the court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the Official Assignee is necessary in the present case;

(2) an undischarged bankrupt in this country is entitled to engage an advocate and solicitor to represent him in any action where the provision of section 38(1)(a) does not apply or where the cause of action does not vest in the Official Assignee.

I would respectfully agree entirely with what Mohamed Azmi J (as he then was) said in that case, at p. 30, *viz.*:

> The first question for determination is whether the requirement of sanction of the Official Assignee under s. 38(1)(a) applies only to a bankrupt's ordinary claims, ie, maintaining court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt is challenging the very validity of the adjudication order by which he has been adjudged bankrupt. Having considered the provisions of the Bankruptcy Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where he is seeking the court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The exception contained within brackets in s. 38(1)(a) clearly indicates that the section is intended to apply only to actions for recovery of something – either real or personal – which can be turned into assets such as a claim for recovery of property or money due. Further, there is nothing in ss. 33, 92 or 105 to indicate that it is the intention of the legislature to require prior sanction of the Official Assignee before a bankrupt can seek relief under those provisions. Under s 33(1), a bankrupt may at any time after being adjudged bankrupt apply to the court for an order of discharge, and there is no legal requirement that for this purpose he should first obtain the sanction of anyone. This is also the case where an application is made to the court under ss. 92(1) and 105(1) of the Act. It is true that s. 24(4) provides that when a debtor is adjudged bankrupt his property shall become divisible amongst his creditors and shall vest in the Official Assignee. The word "property" is defined by s. 2 to include money, goods, things in action, land and every description of property, whether real or personal, obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined. As such, only property as defined above would vest in the Official Assignee at the time of adjudication, and from the definition, unless something can be turned into an asset for payment of debts to the creditors it cannot be described as property within the meaning of s. 2. The present application being not things in action or chose in action cannot be described as something which can be turned into asset for the estate of the bankrupt.

In re Baron [1943] 1 Ch. 177, s. 108(2) of the English Bankruptcy Act 1914 was considered. That section appears in the Act in these words:

Appeals

Appeals in bankruptcy

108. (1) Every court having jurisdiction in bankruptcy under this Act may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

(2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal, as follows:-

…

In that case a receiving order was made against the debtor in 1942 and an adjudication order was made against him in 1943 after an application by the official assignee and after creditors meeting had resolved to do so. The debtor appealed against the order and appeared in person. The court there dealt with the point of the right of the creditors to appear and the court there held that they have no right since the application to have the debtor adjudged a bankrupt was brought by the official assignee. What is significant is that despite being adjudged a bankrupt he was still allowed to appeal and there was no sanction. This tends to support the view of Mohamed Azmi J. The matter in the present case is governed by s. 92 which reads:

Appeals

92 Appeals in bankruptcy

(1) The court review, rescind or vary any order made by it under its bankruptcy jurisdiction.

(2) Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal in the same way as orders of the High Court in other matters are for the time being appealable.

(3) For the purpose of this section the Official Assignee shall be deemed to be aggrieved by the refusal of any application made by him to the court.

Clearly then, on the authority of *Re Khoo Kim Hock* an appeal by an undischarged bankrupt is not caught by s. 38(1) and therefore no prior sanction of the official assignee is required. Section 92 is in substance the same as the English s. 108 where the bankrupt in *In re Baron* was able to appeal without any sanction. Now s. 92 is not concerned only with adjudication orders only but with "order made ... under its bankruptcy jurisdiction" and "orders in bankruptcy matters". The plain and simple meaning of those terms would include, for example, order of stay or refusal of stay or order of extension or refusal of extension of time to do sometime. Therefore, I am unable to agree

with *Re Low Kok Tuan* which, though it did not disagree wih *Re Khoo Kim Hock*, decided that an undischarged bankrupt cannot appeal against an order refusing a stay of the bankruptcy petition. After all, the right to appeal is not a chose in action that can be vested in the official assignee as said in *Re Khoo Kim Hock*. For those reasons too, I am unable to agree with *Bathamani*. At the hearing of the bankruptcy petition, the official assignee is required to state whether he supports the making of a receiving and adjudication order and if the papers are in order, he would invariably support the making of such an order. It would be perverse to expect him to sanction an appeal against the very order which he had supported. Therefore, it is unthinkable that he would give his sanction and this means that a bankrupt can never appeal against an order made against him, no matter if there is injustice in the making of the order. Such a construction of the law should not be had. For that reason too I am unable to agree with the said two decisions. Therefore, I am of the view that an undischarged bankrupt has a right to appeal against any order made by the court in exercise of its bankruptcy jurisdiction and he need not apply for any prior sanction before doing so.

Was The Making Of The Receiving And Adjudication Orders Proper

It is now common ground that the debtor should have, apart from filing the documents I have mentioned earlier to oppose the petition, also taken out a summons in chambers (see *Datuk Lim Kheng Kim v. Malayan Banking Berhad* [1993] 3 CLJ 324) though learned counsel for the debtor argued otherwise before the senior assistant registrar. But learned counsel had also requested for an extension of time to file the necessary summons in chambers which was not granted. After the senior assistant registrar had reserved her judgment, the debtor lodged an application for an extension of time to file the missing summons in chambers. This application was heard after the court on the scheduled date of 12 March 2001 delivered its decision and made the debtor a bankrupt. The application for extension of time was therefore of no consequence and it was subsequently struck off.

The grounds of the appeal against the receiving and adjudication orders are these:

(i) The Honourable Senior Assistant Registrar failed to give the Judgment Debtor a chance to rectify an insufficient Notice by Debtor of Intention to Oppose Petition by filing the requisite Summons-in-Chambers in accordance with Rule 18 of the Bankruptcy Rules 1969 and never took due consideration of the Summon-in-Chambers filed by the Judgment Debtor on 27 February 2001 seeking extension of time, etc, to file the said requisite Summons-in-Chamber.

(ii) The Honourable Senior Assistant Registrar never considered the Notice by Debtor of Intention to oppose Petition and the Affidavit in Support which have shown obvious merits in that there are serious and *bona fide* issues to be considered in that questions on the illegality or voidness of the Hire Purchase Act 1967 have been raised and even more seriously, that fraud in the Plaintiff or by the Plaintiff's officers has been raised and particularised therein.

(iii) That there has never been any proper trial or hearing on the merits of any of the abovementioned grounds … in the lower courts.

The debtor also filed an affidavit in support of the notice of appeal.

As for the ground (i) it will be recalled that the debtor's counsel was informed as far back as 20 November 2000 about the defect in the documents that had been filed in purported opposition to the bankruptcy petition. Nothing was done to rectify the situation until 27 February 2001 by which time the debtor had already argued that the notice of opposition was in order which was obviously unsustainable. Having done so and in anticipation that the argument may not be successful, the debtor wanted a second bite of the cherry by filing the application for the extension of time after the court had adjourned to consider her judgment. On top of that there was no explanation as to why the application for the extension of time was not filed immediately upon the receipt of the notice on 20 November 2000 and before the first hearing of the petition on 11 December 2000. Therefore, there was no merit in the argument that the senior assistant registrar had not acted correctly in rejecting the request of the debtor for an adjournment to file the application for an extension of time to lodge the summons in chambers when it was not explained why that application was made during the period I have just mentioned. As for ground (ii), there is nothing for the court to consider in so far as those matters for which a summons in chambers was required, since the failure to file such render the opposition ineffective. As for the other matters which may be regarded as constituting a counterclaim, set-off or cross demand, these were put forth in the lower court in which judgment was given. The debtor was given leave to defend conditional upon him paying into court the sum claimed. He did not pay the money into court as a result of which judgment was entered. It will be remembered that s. 3(1)(i) says that one of the requirement is that such matters could not be set up in the action in which judgment was entered. In this case, it was in fact set up but they failed because the debtor did not pay the sum claimed into court as a condition for defending. At best the allegations of fraud by the debtor can be regarded as supporting a counterclaim. They do not support a set off or cross demand. For a counterclaim to be a defence to a bankruptcy petition, three ingredients must be satisfied. These are that (1) it can be quantified and must be quantified,

(2) it was put forth in good faith and had a reasonable probability of success and (3) it could not have been set up in the court in which judgment was entered (see *Perwira Habib Bank Malaysia Bhd v. Samuel Pakianathan* [1993] 3 CLJ 349). As for the requirement (2), it can be assumed that it has been satisfied because the creditor did not file any affidavit pointing to evidence that says otherwise. In this regard assertions of facts by the creditor's counsel in her submission will have to be disregarded as being pure summation unsupported by evidence. Be that as it may, the debtor had failed to satisfy requirement (1) and (3). The counterclaim was not quantified and the counterclaim was in fact set up in the lower court but unsuccessfully.

Conclusion

In the premises the appeal is dismissed with costs to the creditor. The stay which I have granted on 8 June 2001 is lifted.